No. 34356-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 15-1-00085-4

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JOSE G. BARBOZA CORTES,
Defendant/Appellant.

BRIEF OF RESPONDENT

Douglas J. Shae
Chelan County Prosecuting Attorney

Conor C. Johnson WSBA #43119
Deputy Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
P.O. Box 2596
Wenatchee, Washington 98807-2596
(509) 667-6204

TABLE OF CONTENTS

TABLE OF CONTENTS (con't)

TABLE OF CONTENTS (con't)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (con't)

TABLE OF AUTHORITIES (con't)

A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not error in denying the defendant's motion to suppress evidence because the affidavit provided probable cause and a nexus to Mr. Barboza's residence.

2. The trial court and the State likely erred in convicting Mr. Barboza Cortes of three counts of possession of stolen property.

3. The trial court did not error in with regards to the unlawful possession of a firearm because it is not an alternative means crime and if it is all alternatives are supported by sufficient evidence.

4. The trial court did not error with regards to the second degree identity theft conviction concerning Dava Construction because identity theft is not an alternative means crime and there is sufficient evidence.

5. The trial court correctly sentenced Mr. Barboza upon an offender score of eight.

6. The trial court did not error in prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages.

7. The judgment and sentence should be corrected to remove the $250 drug enforcement fund cost as it was not imposed by the trial court.

8. The trial court did not error in imposing the jury demand fee if that is a mandatory court fee. If it is not, the State agrees with Mr. Barboza that the imposition of the jury demand fee is erroneous.

9. It is not appropriate to place this type of motion in a brief pursuant to RAP 10.4(d). The motion must be stricken or ignored and further that motion is not ripe.

10. There is clearly sufficient evidence supporting each of the convictions obtained from the jury trial.

B. STATEMENT OF THE CASE

Jose Barboza Cortes was charged by fifth amended information with the following:

- Count I: unlawful possession of methamphetamine with intent to deliver;
- Count II: second degree unlawful possession of a firearm;
- Count III: third degree possession of stolen property;
- Count IV: forgery;
- Count V: second degree identity theft;
- Count VI: third degree possession of stolen property;
- Count VII: forgery;
- Count VIII: second degree identity theft;
- Count IX: third degree possession of stolen property;
- Count X: second degree identity theft;
- Count XI: forgery; and
- Count XII: second degree identity theft. (CP 197).

Prior to trial, Mr. Barboza moved to suppress evidence, but the trial court denied the motion. (CP 76, 311). He stipulated that

he had two prior felony convictions for purposes of the unlawful possession of a firearm charge. (2/23/16 RP 73, 109-10; CP 130). In a CrR 3.5 hearing, the court decided statements made by Mr. Barboza in a civil forfeiture hearing were admissible. (2/23/16 RP 75-88). The statements he made were (1) an 8-ball of methamphetamine was 3.5 grams, not 4.5; and (2) the methamphetamine was his. (*Id.*). At trial, Mr. Barboza specifically argued that the Methamphetamine was for his personal use. (2/25/16 RP 431).

The case arose from a vehicle prowl where checks were stolen and deposited into Mr. Barboza's account at Cashmere Valley Bank. (CP 3-7, 29-39). The defense did not dispute the checks were stolen by someone; they were altered; and Mr. Barboza deposited the checks. (2/23/16 RP 120-22; 2/25/16 RP 451). Juliana Garcia was involved in a fundraiser for the medical assistants program at Wenatchee Valley College (WVC) in January 2015. (2/24/16 RP 312-13). She was the treasurer and had about $1,015 in cash and $250 in checks from the fundraiser in her backpack. (*Id.*). After Ms. Garcia drove home, her backpack with all the money and checks in it was stolen from her car. (*Id.*). She testified she did not know Mr. Barboza; there was no reason for

him to have the WVC checks; she did not give him any checks; and she did not negotiate the checks to anyone. (*Id.* at 314-15). Ms. Garcia called the police. (*Id.* at 315). Corporal Tim Lykken took her call and responded January 16, 2015. (2/24/16 RP 326). He followed some shoe prints that started right next to her car, but lost the trail. (*Id.* at 329). Corporal Lykken saw no signs of forced entry into the vehicle. (*Id.* at 330). The evidence later showed that the shoe prints next to Ms. Garcia's car did not match Mr. Barboza's shoes. (2/25/16 RP 393-94).

Windy Cochran of Cashmere Valley Bank was contacted by police regarding Mr. Barboza. (2/24/16 RP 166-67). After collecting information on his account and creating a temporary bank statement, she testified four checks were deposited at an ATM into his account on January 27, 2015. (*Id.* at 168-72). Videos at the ATM for the time and date when the checks were deposited showed Mr. Barboza depositing the checks. (*Id.* at 175-79). They were put into his Cashmere Valley Bank account with Mr. Barboza's address as 747 Cascade St., Wenatchee, WA. (*Id.* at 182). Ms. Cochran further testified charge-back notices were mailed to Mr. Barboza with his account closed and in charge-off status as unsatisfactory. (*Id.* at 192; 2/25/16 RP 387).

One check was from Tamara Grigg made out to WVC with a hyphen and the name Tyler Oliver following, which appeared to Ms. Cochran to be an alteration. (2/24/16 RP 189-90). There was nothing to show the check was endorsed, however, as ATM deposits did not require endorsements before accepting checks. (*Id.* at 188, 191). Another check was from Michelle Mahoney-Holland, also made out to WVC, with the name Tyler Oliver following. (*Id.* at 189). Ms. Cochran noted the handwriting did not match for WVC and Tyler Oliver. (*Id.* at 189). She did not know who altered the check. (*Id.* at 189-90). Jennifer Sanon wrote a check to WVC and no one else. (*Id.* at 190). She could not recall whether or not the check was endorsed. (*Id.*). Another check was made out to Francisco Villa by Dava Construction for $738.37. (*Id.* at 189). This check did not appear to be altered, but the $738.37 was charged back as not payable. (*Id.* at 189, 192).

Alta Reyna lived at 747 Cascade St. in Wenatchee. (2/24/16 RP 201-02). In January and February 2015, she rented the basement of her house to Mr. Barboza. (*Id.* at 202). No one else rented from her. (*Id.*). Ms. Grigg testified she wrote a check to WVC for a raffle ticket and gave the check to Julie Garcia. (2/24/16 RP 203-05). She said another name was on the check

next to WVC, but she did not know who wrote it in. (*Id.* at 206). Ms. Grigg did not know Mr. Barboza. (*Id.*). The check had her name and address and was the same as she had written except for the alteration. (*Id.* at 208). Shelly Bedolla and her husband owned Dava Construction. (2/24/16 RP 209). Testifying as to the check to Francisco Villa and signed by Tom Collins, she indicated she knew neither person. (*Id.* at 210). Although reflecting the right name and address of their business, the check was not theirs. It was a U.S. Bank check and they did not bank there. (*Id.* at 210-11). Ms. Bedolla signed all checks and this one was signed by Tom Collins. (*Id.* at 211). The check was not legitimate, but she did not know who made it out. (*Id.* at 211-12). Ms. Mahoney-Holland confirmed she wrote a check to WVC's medical assistants program in January 2015. (2/24/16 RP 212). It was a $10 check for a fundraiser. (*Id.*). She did not write in the additional payee, Tyler Oliver, who appeared on the check next to WVC. (*Id.* at 215). Ms. Mahoney-Holland testified there was no reason for Mr. Barboza to have the check. (*Id.* at 216). She did not know who wrote Tyler Oliver on the check, which had her correct name and address on it. (*Id.* at 216-17). Ms. Sanon also wrote a check, with her correct name and address on it, to WVC for a fundraiser.

(2/24/16 RP 218-20). The check also contained a notation on the "for" line designating Tyler's breakfast. (*Id.* at 220). She did not know who wrote that on the check. (*Id.* at 220). Ms. Sanon expected the check to be deposited by WVC into its account, not by Mr. Barboza into his account. (*Id.* at 219-20).

Officer Nathan Hahn had contact with Mr. Barboza in January or February 2015. (2/24/16 RP 240). He wrote the first search warrant to Cashmere Valley Bank regarding items related to Mr. Barboza's account and the ATM where he deposited checks in that time frame. (*Id.* at 241-42). The officer identified where Mr. Barboza lived as 747 Cascade in Wenatchee and prepared the search warrant for his residence. (*Id.* at 243; 2/25/16 RP 342-43).

The warrant was executed on February 5, 2015. (2/24/16 RP 288, 316). Mr. Barboza was at his residence at the time. (2/25/16 RP 343). No one else was in the basement. (*Id.*). When a shotgun was found, the search was stopped and the warrant amended to include a search for firearms and related items. (*Id.* at 394). Officer Hahn did later fire the shotgun, which was operational and fired a .410 shell. (*Id.* at 344-48). The officer also identified Mr. Barboza as the man in the ATM videos. (*Id.* at 349-50). The Dava Construction check to Francisco Villa was found in his

residence. (*Id.* at 351). Officer Hahn amended the warrant a second time when drugs, including an 8-ball of methamphetamine, were found. (2/25/16 RP 381). Each amendment was approved by a judge. (*Id.*). The officer was also at a civil forfeiture hearing concerning $220 cash found on Mr. Barboza. (*Id.* at 350). He corrected the officer that an 8-ball was not 4.5 grams, but rather 3.5 grams. (*Id.*at 356-57). At the civil forfeiture hearing, he said the 8-ball belonged to him. (*Id.* at 357, 370). Mr. Barboza had legitimate income from unemployment of $139/week. (*Id.* at 369, 380). Officer Scott Reiber participated in the execution of the search warrant. (2/24/16 RP 265-66). Mr. Barboza came to the door and was taken into custody. (*Id.* at 267). He was not armed when he came up from downstairs. (*Id.* at 272).

Sergeant Richard Johnson recovered the pump-action shotgun during the search. (2/24/16 RP 283-84). It was between two mattresses in the bedroom and was not easily accessible as the mattresses had to be pulled apart. (*Id.* at 284). The sergeant found no shotgun shells. (*Id.* at 287). Officer Kevin Battis helped in the execution of the search warrant on February 5, 2015. (2/24/16 RP 297). Mr. Barboza was detained and transported to the police station. (*Id.* at 300). Drug related items were also

seized. (*Id.* at 317). They were not on the warrant so the search was stopped at that point for amendment of the warrant to authorize a search for drugs and related items. (*Id.*at 318). The officer also indicated the warrant had been amended for firearms after the shotgun was found. (*Id.* at 319). Finally, multiple indicia of residency were found in the apartment, including letters or paperwork. (RP 285).

No exceptions were taken to the court's jury instructions. (2/25/16 RP 397-98). In closing argument, defense counsel acknowledged Mr. Barboza was not contesting he possessed methamphetamine; was not disputing he was to have no firearms; and was not disputing he deposited the checks in question. (*Id.* at 431, 446-47, 451). The State argued to the jury that the Dava construction check was created and therefore the jury was not being asked if it was stolen. (RP 402). Further the State argued that the checks other than the Dava Construction check had both identifying information as well as financial information. (RP 424-425).

The jury found Mr. Barboza not guilty of count I: unlawful possession of methamphetamine with intent to deliver, but guilty of the lesser included offense of possession of methamphetamine.

(CP 264-67). The jury further convicted him of count II: second degree unlawful possession of a firearm; count III: third degree possession of stolen property; count V: second degree identity theft; count VI: third degree possession of stolen property; count VIII: second degree identity theft; count IX: third degree possession of stolen property; count X: second degree identity theft; and count XII: second degree identity theft. (CP 267-69, 271-72, 274-76, 278). The jury found him not guilty of count IV: forgery; count VII: forgery; and count 11: forgery. (CP 270, 273, 277). The court sentenced Mr. Barboza to 43 months on count II and ran all other sentences on the remaining convictions concurrently for total confinement of 43 months. (4/13/16 RP 481-83; CP 283). After inquiring of his earning capacity, the court further ordered mandatory LFOs and payments of $10/month. (*Id.* at 438-84; CP 283). This appeal follows. (CP 305).

C. ARGUMENT

Issue 1: Whether the trial court should have suppressed the evidence seized from Mr. Barboza's home pursuant to the search warrant, due to the sufficiency of the nexus between the items sought and Mr. Barboza's residence.

The search warrant granting access into Mr. Barboza's residence was valid because there was a clear nexus between the suspected crime and the defendant's residence.

The decision to issue a search warrant is highly discretionary. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Accordingly, courts generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. *Id.* (citing *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002)); *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant's control." *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997). Neither the State nor a defendant may use a retrospective analysis of what was found by a warrant but instead must solely look at the four corners of the warrant and affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). An

affidavit is reviewed by a court in a commonsense manner rather than hypertechnically. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

In his brief, Mr. Barboza cites *State v. Thein* for the proposition that it is unreasonable to infer that any evidence of the crimes was located at his residence. *State v. Thein,* 138 Wn.2d. 133, 977 P.3d 582 (1999). Yet *Thein* recognized that under specific circumstances it may be reasonable to infer that certain items will likely be kept where the person lives. *Thein,* 138 Wn.2d at 149, Footnote 4; *see also* Wayne R. Lafave, *Search and Seizure* § 3.7(d), at 381-85 (3d Ed. 1996) ("Where the object of the search is a weapon used in the [commission of a] crime or clothing worn at the time of the crime, the inference that the items are at the offender's residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to police.") (emphasis added); *State v. Condon*, 72 Wn. App. 638, 644, 865 P.2d 521 (1993).

Washington courts have stated that with regard to the crimes of theft, burglary, or robbery, in which valuable property is obtained by the perpetrator, "'it is proper to infer that the criminal would have the fruits of his crime in his residence, vehicle or place

of business.'" *State v. McReynolds*, 104 Wn. App. 560, 569, 17 P.3d 608 (2000) (quoting Wayne R. Lafave, *Search and Seizure* § 3.7(d) at 381-84 (3d Ed. 1996)). In *McReynolds*, the Court of Appeals observed that "'the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property'" may all be considered in determining a nexus between stolen property and where such stolen property would likely be found. *Id.* at 570 (internal quotation marks omitted) (quoting Lafave, *supra*, at 381-84).

In Mr. Barboza's case the officers were looking for the following evidence:

- White backpack
- Books
- Manila folder
- Checks
- Fund raiser tickets
- Debit card
- Nike shoes and
- Indicia of residence

The indicia of residence obviously would only be found at the residence. It is also rational to infer that a person keeps their shoes and a debit card at their residence.

Pursuant to *McReynolds*, it is reasonable to infer that remaining evidence would be located at Mr. Barboza's residence. First, the evidence sought in the search warrant include personal property and financial documents. Second, unlike *McReynolds*, Mr. Barboza clearly had an opportunity to return to his residence in the intervening time between when the items were stolen and when the search warrant was executed. The items were stolen on January 16, 2015. (2/24/16 RP 326). The checks were deposited on January 27, 2015. (*Id.* at 168-72). The search warrant was executed on February 5, 2015. (2/24/16 RP 288, 316). Third, the State submits that it is reasonable to assume that a person who committed a robbery/burglary or theft would normally keep items they have stolen, if not immediately disposed of at the time of the crime, at their residence. It would be reasonable to infer Mr. Barboza would conceal the checks at his residence and wait a period of time before attempting to cash them. Further, after Mr. Barboza cashed the checks, his account became overdrawn and was ultimately closed. (*Id.* at 192; 2/25/16 RP 387). As the account was overdrawn and closed, it would be reasonable to infer that the stolen checks would be located at Mr. Barboza's residence because he no longer had an account to deposit checks into.

Given the above, it was reasonable to infer that Mr. Barboza would keep the evidence of his crimes at his residence. Further, pursuant to the analysis in *McReynolds, a* nexus existed between the crimes and the location where evidence of such crimes would be found. Thus, the search warrant was valid and the evidence found in Mr. Barboza's residence pursuant to the search warrant is admissible.

Issue 2: Whether the trial court erred by convicting Mr. Barboza of three counts of third degree possession of stolen property (counts 3, 6, and 9), where entry of these three convictions are for the same criminal conduct.

The State concurs that, with regards to the possession of stolen property counts, Mr. Barboza should be resentenced on only count three with counts six and nine to be dismissed.[1] Because all of the counts of possession of stolen property were not crimes that added points to Mr. Barboza's offender score, his remaining felony convictions sentences would be unaffected.

[1] The State believes that an argument could be made that Mr. Barboza did not possess the checks simultaneously at all times. After each check was deposited into the ATM, Mr. Barboza could no longer physically possess that specific check. However, the State is not asking the court to find that this is significant enough difference to distinguish Mr. Barboza's case from the cases cited in his brief.

Issue 3: Whether the trial court erred in not giving a unanimity jury instruction for unlawful possession of a firearm in the second degree.

The trial court did not error in not giving a unanimity instruction for Count II. Further, if this is an alternate means crime there was sufficient evidence for each alternative.

The State agrees that the *Holt* case indicates that "[s]econd degree unlawful possession of a firearm is an alternative means offense committed when a convicted felon (1) owns, (2) possesses, or (3) controls a firearm." *State v. Holt*, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), *overruled on other grounds by State v. Willis,* 153 Wn.2d 366, 103 P.3d 1213 (2005). However, this case is at odds with *State v. Owens,* 180 Wn.2d 90, 323 P.3d 1030 (2014), *and State v. Butler,* 194 Wn. App. 525, 374 P.3d 1232 (2016), which determined that similar verbs found in the statutes concerning identity theft and trafficking in stolen property, did not indicate alternative means of a crime, but rather indicated multiple facets of a single means. As stated in *Butler* discussing the identity theft statute:

> Here, the four verbs describing identity theft are like the seven verbs that described the first alternative means of trafficking in stolen property in *Owens*. The verbs here are not distinct means by which to commit identity

> theft, but rather are multiple facets of a single means. For instance, following the analysis in *Owens*, it would be hard to imagine the crime of identity theft being committed by a single act of "using" a check that did not also involve "obtaining" and "possessing" the check. Likewise, one could not "transfer" financial information without also "obtaining" and "possessing" that information.

Butler, supra at 530. Similarly, in *State v. Owens*, the court addressed the language of the trafficking stolen property statute. *Owens, supra,* at 99. In *Owens,* the Washington Supreme Court stated:

> [a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

Id. at 96. The court went on to state:

> For example, it would be hard to imagine a single act of stealing whereby a person "organizes" the theft but does not "plan" it. Likewise, it would be difficult to imagine a situation whereby a person "directs" the theft but does not "manage" it. Any one act of stealing often involves more than one of these terms. Thus, these terms are merely different ways of committing one act, specifically stealing.

Id. at 99.

In Mr. Barboza's case the State is unable to imagine a situation in which someone possesses or owns a firearm without also controlling it in some fashion. The terms possession, control or owns appear to be multiple facets of a single means. That single means is possessing some "dominion" over a firearm to the exclusion of others. The holdings in *Butler* and *Owens* should control the reading of the unlawful possession of a firearm statute, and this court should find that possess/control/own are not alternative means, but rather facets of the same single means.

For example, consider a scenario in which a person owns a firearm but loans it to another. Thereby, the owner is ceding part of the dominion the owner holds over the object and the person who is loaning it has some control and direct possession. In that case, the owner no longer physically possesses the firearm but the owner would still exercise some element of control and dominion in doing so. If this is an alternative means crime, one completes this crime by either (a) exercising some dominion/control over a firearm, or (b) exercising complete dominion/control over a firearm. This is a distinction without a difference. All three of the listed words are simply multiple facets to the exercise of some part of dominion over a firearm.

If the court determines that there are two or three alternative means, there is sufficient evidence to show Mr. Barboza owned the firearm, in addition to the possessing and controlling it which appear to be uncontested. There is no right to express jury unanimity so long as each alternative means is supported. *State v. Woodlyn*, 188 Wn.2d 157, 170, 392 P.3d 1062 (2017). Evidence can be direct or circumstantial, as the jury was instructed. (RP 618). A summary of the circumstantial evidence that defendant owned the firearm is as follows:

- A pump action shotgun was recovered from Mr. Barboza Cortes' residence which is a basement apartment. (RP 283).
- It was found between two mattresses, stacked together, the in bedroom of the basement. (RP 284).
- There was only one bedroom. (RP 284).
- The mattresses were on the floor stacked on top of each other and the appeared to be the only mattresses in the basement apartment. (RP 284).
- The mattresses had to be pulled apart to find the shotgun. (RP 284).
- Multiple indicia of residency were found in the apartment, including letters or paperwork. (RP 285).
- Mr. Barboza Cortes was the only person in the basement apartment when the search warrant was served. (RP 268, 343).
- Mr. Barboza Cortes was the sole renter for the basement apartment. (RP 202).

It logical to infer from these circumstances that Mr. Barboza exercised complete dominion over the items in his apartment to the

exclusion of others. Obviously, with regards to the firearm, that dominion was illegal but that does not negate his exercise of dominion over the firearm. Indeed, the illegality of his dominion over the firearm likely would increase the likelihood that he exercise the dominion in secret and to the exclusion of others for if he did not, he could be arrested.[2] He clearly owned what was in his apartment. For example, he admitted to owning the methamphetamine to the officers and stated it was for personal use. (RP 78). Why would the other items in his apartment be any different? Mr. Barboza clearly owned his mattresses and what was in between his mattresses. There is no evidence to the contrary. Therefore, there is sufficient evidence for the alternative means of ownership, assuming that is an alternative means crime. Pursuant to *Woodlyn,* this conviction must be affirmed.

---

[2] Should the argument be raised in the Reply that Mr. Barboza could not own the firearm because he is prohibited from obtaining a "legal title" to the firearm this statute would become paradoxical and impossible. It would be a crime to own a firearm with a prior felony conviction; but, one cannot establish "ownership" of a firearm if it would illegal to do so. This cannot be what was intended by the legislature. This is an absurd result.

Issue 4: Whether the trial court erred in not giving a unanimity jury instruction for identity theft in the second degree, count 12.

Identity theft in the second degree is not an alternative means crime. *State v. Butler,* as cited by Mr. Barboza, states: "We hold that identity theft is not an alternative means crime, and therefore the trial court did not error by not issuing a unanimity instruction." *State v. Butler,* 194 Wn. App. 525, 530, 374 P.3d 1232 (2016). Indeed the Washington Pattern Jury Instructions for Criminal Cases (WPICS) does not list the crime as an alternative means crime. WPIC 131.06.

If the court finds that this is an alternative means with regards to means of identification and financial information, the State asks the court to use caution in choosing how and whether to apply *Woodlyn's* dicta directly to these facts:

> The constitutional right to jury unanimity cannot be interpreted to permit the harmless error analysis adopted by the Court of Appeals. We reject this approach and decline to burden trial courts with the task of distinguishing between evidence that is sufficiently insufficient and that which is insufficiently insufficient.

Woodlyn, supra, at 178. However, in this specific case, the State is not asking to court to weigh or distinguish evidence. There is

nothing to weigh. The court does not need to determine what is "insufficiently insufficient" when there is absolutely no evidence. Absolutely no evidence has to be insufficient. There is no other possibility. The State asks the court to recognize that there is absolutely zero evidence that the defendant in any way used "financial information" of the Dava Construction Company. Mr. Barboza has stated as much in the supplemental brief. Indeed, the State argued this to the jury and only presented evidence that showed that there was no financial information of Dava Construction:

> On the Dava Construction check, the bank -- Ms. Cochran, from Cashmere Valley Bank, indicated, well that check, actually, wasn't even legitimate, to begin with. You are not being asked if that check was a stolen check or not.

(RP 402), and:

> [t]he checks – except for the Dava construction check – also have financial information on them. And, as, probably many of you know, you have an account number and a routing number, on the bottom of those checks. That's financial information.

(RP 424-425). In other cases they may be some question that the jury could have relied on insufficient evidence of an alternative, but when there is absolutely absence of the alternative, the court can

be confident that the jury followed the instructions and convicted based on the evidence. To hold to the contrary the court is presuming the jury did not follow the court's instructions contrary to decades of established case law. "A jury is presumed to follow the court's instructions." *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). There is no reason to doubt that the jury convicted Mr. Barboza for using the means of identification of Dava Construction and not financial information. Mr. Barboza's conviction for the identity theft of Dava Construction must be affirmed.

Issue 5: Whether the trial court erred by sentencing Mr. Barboza based upon an offender score of eight.

The trial court did not error in sentencing Mr. Barboza based upon an offender score of an eight. The State recognizes this court is limited by the trial court record, however, the State also has a duty of candor to the tribunal. RPC 3.3. As such the State believes it is has a duty to correct a factual misstatement by opposing counsel. While the misdemeanor convictions establishing that Mr. Barboza was scored correctly by the trial court are absent from the record, defense counsel's statements contained in the Supplemental Brief that Mr. Barboza was crime

free in the community for five or more years are factually not true. Mr. Barboza's previous felony convictions do not wash-out due to intervening misdemeanor convictions between the felony convictions.

This court has a duty to correct obvious sentencing errors. *In Re Call,* 144 Wn.2d 315, 334, 28 P.3d 709 (2001). Mr. Barboza, however, is not entitled to remand unless the court can discern from the appellate record that a miscalculation in fact occurred. If the record merely indicates that the offender score *might* have been miscalculated, judicial economy militates against a remand that could ultimately prove to be futile. If a defendant in this situation believes a miscalculation has occurred that is not reflected in the record, the defendant's remedy is to file a personal restraint petition, which allows him or her to supplement the record. RAP 16.4(c)(3).

The record establishes that trial counsel had the understanding that Mr. Barboza was to be scored as an "eight". Mr. Barboza's counsel at trial, Travis Brandt, stated the highest ranged offense was 43-57 months and specifically asked for 43 months. (RP 478). If Mr. Brandt had a different interpretation of his client's offender score, this range would not apply and this point

would have been addressed at the trial level. Because Mr. Barboza's score was calculated correctly, it was not raised as an issue. Trial counsel, of course, is presumed to be competent and the presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Because the record does not establish there was any error, Mr. Barboza is not entitled to a remand and resentencing but is free to pursue a personal restraint petition as to this matter. Should a personal restraint petition be filed, the State could introduce Mr. Barboza's entire criminal history. Further, as it is likely Mr. Barboza will be resentenced anyway, the State will be certain that the record is very clear about the intervening convictions. Mr. Barboza is not entitled to resentencing at a lower score because of an incomplete appellate record. The absence of evidence is not evidence of absence.

Issue 6: Whether the trial court erred in imposing a condition of community custody prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of alcoholic beverages.

The trial court did not error in prohibiting Mr. Barboza from frequenting places whose principal source of income is the sale of

alcoholic beverages. The State agrees that this court reviews whether a community custody condition is crime-related and reviewed under the abuse of discretion standard. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)).

Mr. Barboza was previously convicted of possession of cocaine on two different dates. (CP 283, 285, 293-295: RP 477-482). Mr. Barboza's counsel specifically argued that the defendant had a drug problem:

> Mr. Barboza, during this period of time, had a very significant and substantial drug problem. There's no way to hide that. We didn't attempt to hide that, from you. Mr. Barboza didn't attempt to hide that from Detective Hahn -- or Corporal Hahn -- during the civil hearing, when he told him that the drugs -- that the methamphetamines were for his personal use .... We know that he has a drug addiction.

(RP 428). The jury ultimately appeared to have believed the argument. Mr. Barboza was convicted of possession of methamphetamine as a lesser-included offense of possession of methamphetamine with intent to deliver. (CP 264-266; RP 626-632). The trial court imposed a sentence condition prohibiting Mr. Barboza from consuming non-prescribed drugs or alcohol or any

other mind altering substances. Therefore, prohibiting Mr. Barboza from frequenting bars and taverns is reasonably related to crime. The trial court certainly did not abuse its discretion by ordering the condition. Mr. Barboza is not entitled to having this condition stricken.

Issue 7: Whether the judgment and sentence contains an error in imposing the $250 drug enforcement fund fee.

The State concedes error in assessing the drug enforcement fund of $250 in light of record: "[t]he Court won't impose any attorney's fees recoupment or drug fund penalty, because of the prospect that Mr. [Barboza] is not going to have much money, after he's released." (RP 483). On at least one issue, resentencing is likely and this matter should be remanded so that this fee may be removed from Mr. Barboza's judgment and sentence.

Issue 8: Whether the trial court erred by imposing a $250 jury demand fee.

The State joins Mr. Barboza in requesting that this court exercise its discretion under RAP 2.5(a) to decide this issue. The State believed this fee was mandatory, however, Mr. Barboza's trial occurred before the cases cited by counsel were decided. *State v. Clark,* 195 Wn. App. 868, 381 P.3d 198 (2016), does not decide the issue but assumes it is discretionary, however, a footnote in the

Clark decision recognizes at least one case where the fee was assumed it to be a mandatory fee. *Clark*, *supra,* at fn. 1, *citing State v. Munoz-Rivera*, 190 Wn. App. 870, 894, 361 P.3d 182 (2015). The State is not aware of further useful authority on point. If this court believes the fee is not mandatory, Mr. Barboza should be resentenced without this fee, or remanded so the trial court may better inquire into whether Mr. Barboza is indeed able to pay discretionary costs. The State respectfully requests that this court consider publishing this decision for future guidance.

Issue 9: Whether this court should deny costs against Mr. Barboza on appeal in the event the State is the substantially prevailing party.

Mr. Barboza's request to deny costs is a motion in a brief. However, the motion is not one that is able to be granted in such a way that would preclude hearing the case on the merits. Therefore, this motion is not allowed pursuant to RAP 10.4(d) and should be stricken or otherwise denied. Further, the issue is not ripe as the court has not decided the other issues raised in the defendant's briefs.

Issue 10: Whether there is insufficient evidence for all convictions. (Response to defendant's first appellate brief).

Overwhelming evidence supports all of Mr. Barboza's convictions. The jury found him guilty of the following: the lesser-included offense of unlawful possession of a controlled substance – methamphetamine; second degree unlawful possession of a firearm (count II); three counts of third degree possession of stolen property (counts III, VI, and IX); and four counts of second degree identity theft (counts V, VIII, X, and XII). (CP 264-278; RP 626-632).

Mr. Barboza does not directly state which convictions were not proven beyond a reasonable doubt. He also does not appear to mention the possession of methamphetamine conviction therefore the State believes Mr. Barboza is not raising any error with regard to that conviction (other than regarding issuance of the search warrant). Count I, possession of methamphetamine, should therefore be affirmed.

There is overwhelming evidence supporting Mr. Barboza's conviction for unlawfully possessing a firearm in the second degree, count II. (See Issue 2, *supra)*.

There is also overwhelming evidence supporting Mr. Barboza's convictions for identity theft in the second degree and possession of stolen property.

One of the checks cashed by Mr. Barboza contained the business information for Dava Construction. Shelly Bedolla, a representative of Dava Construction, however, testified she did not know Mr. Barboza. (RP 209).

Mr. Barboza also cashed checks written by Ms. Grigg, Ms. Sannon and Ms. Mahoney-Holland. Ms. Grigg, who wrote a check to WVC, testified she did not know Mr. Barboza. (RP 203 and 206). Ms. Mahoney-Holland confirmed she wrote a check but there was no reason for Mr. Barboza to have it. (RP 216). Ms. Sanon also wrote a check. (RP 218-220). Ms. Sanon expected the check to be deposited by WVC into its account, not by Mr. Barboza into his account. (RP 219-20). Juliana Garcia, who received the above-mentioned checks and other monies for a fundraiser, put the money and checks in her backpack, drove home, and her backpack was later stolen from her car. (RP 312-13). She testified she did not know Mr. Barboza, there was no reason for him to have the WVC checks, she did not give him any checks, and she did not negotiate the checks to anyone. (RP 314-15). Yet, Mr. Barboza

deposited the checks into his own personal bank account even though they were clearly made out to another party. It is completely reasonable to infer he knew he was in possession of stolen property. Since the maker's information was on the check, it is also reasonable to infer he knowingly used the checks, with the victim's identity and financial information, to defraud the bank with stolen property.

Mr. Barboza claims that the State did not submit sufficient evidence to prove knowing possession of stolen property or identity theft in the second degree because the ATM did not require endorsements of checks for them to be deposited. (2/24/2016 RP 188, 191). The fact that the ATM did not require endorsement, however, demonstrates that Mr. Barboza could have easily submitted unendorsed checks and defrauded the bank, and therefore committed identity theft by that action. Lack of an endorsement by the ATM neither proves nor disprove the criminal charges. The State is unaware of any requirement that the State show endorsement of checks to prove possession of stolen property or identity theft in the second degree. Mr. Barboza cites to no authority to support his argument.

D. CONCLUSION

Based on the above, this court should affirm the trial court's denial of Mr. Barboza's motion to suppress evidence found pursuant to the search warrants. There is clear probable cause and a nexus between the evidence sought and Mr. Barboza's residence. This court should remand this case for resentencing of the three convictions for possession of stolen property. Two counts as noted above should be dismissed. Mr. Barboza's conviction for unlawful possession of a firearm in the second degree should be affirmed as it is not an alternative means crime and there is a sufficient evidence if the court finds it to be an alternative means crime. This court should also affirm the Dava Construction identity theft in the second degree conviction (count XII) as that count is not an alternative means crime and there is sufficient evidence to support the conviction.

Mr. Barboza was correctly scored as an eight on his offender range as the record does not show that this was in any way error. The condition of community custody prohibiting Mr. Barboza from frequenting bars or taverns is clearly appropriate in light of the defendant's history of substance abuse. The $250 dollar drug enforcement fund fee is an error on the judgment and sentence

and that should be remanded to remove that fee. If the jury demand fee is mandatory, that fee should remain. If, however, the fee is found to be discretionary, it should be removed. Mr. Barboza's motion regarding costs should be struck. Finally there is clearly sufficient evidence supporting each of convictions found by the jury. Therefore, affirmation is appropriate to all counts, except for two of the possession of stolen property counts.

DATED this 25th day of September, 2017.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney

By: Conor C. Johnson, WSBA #43119
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent, vs. JOSE G. BARBOZA CORTES, Defendant/Appellant.	No. 34356-1-III Chelan Co. Superior Court No. 15-1-00085-4 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 25th day of September, 2017, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

Jill Shumaker Reuter Kristina M. Nichols Nichols and Reuter, PLLC P.O. Box 19203 Spokane, WA 99219-9203 jill@ewalaw.com admin@ewalaw.com	( ) U.S. Mail ( ) Hand Delivery (X) E-Service Via Appellate Courts' Portal

Signed at Wenatchee, Washington, this 25th day of September, 2017.

Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

DOUGLAS J. SHAE
CHELAN COUNTY
PROSECUTING ATTORNEY
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

CHELAN COUNTY PROSECUTING ATTORNEY

September 25, 2017 - 1:40 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34356-1
Appellate Court Case Title:	State of Washington v. Jose G. Barboza Cortes
Superior Court Case Number:	15-1-00085-4

The following documents have been uploaded:

- 343561_Briefs_20170925133924D3171049_5941.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Barboza Cortes 34356-1 Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- admin@ewalaw.com
- douglas.shae@co.chelan.wa.us
- jill@ewalaw.com

Comments:

Sender Name: Cindy Dietz - Email: cindy.dietz@co.chelan.wa.us
Filing on Behalf of: Conor Carl Johnson - Email: Conor.johnson@co.chelan.wa.us (Alternate Email: prosecuting.attorney@co.chelan.wa.us)

Address:
P.O. Box 2596
Wenatchee, WA, 98807
Phone: (509) 667-6204

Note: The Filing Id is 20170925133924D3171049